

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

Proposed Amendments to Chapter 12-10, 12-14, 12-15
Hawaii Administrative Rules
Workers' Compensation Law
Vocational Rehabilitation
Workers' Compensation Medical Fee Schedule

October 4, 2010

1. Section 12-10-1, Hawaii Administrative Rules, is amended by amending the definitions of "Able to resume work" and "Attending physician" to read as follows:

"Able to resume work" [means an industrially injured worker's injury has stabilized after a period of recovery and the worker is capable of performing work in an occupation for which the worker has received previous training or for which the worker had demonstrated aptitude. If the worker is unable to perform offered light work, temporary total disability benefits shall not be discontinued based solely on such inability to perform or continue light work.] shall be as defined in section 386-1, HRS.

"Attending physician" [means a physician who is primarily responsible for the treatment of a work injury. There shall not be more than one attending physician. In the event an injured employee is treated by more than one physician in accordance with section 12-15-40, the employee shall designate a physician as the attending physician.] shall be as defined in section 386-1, HRS." [Eff: 4/30/81; am 12/17/82; am 11/29/85, am] (Auth: HRS §§386-27, 386-72) (Imp: HRS §§386-1, 386-2, 386-3, 386-21, 386-24, 386-25, 386-27, 386-31, 386-32, 386-42, 386-43, 386-51, 386-71, 386-91, 386-121)

2. Section 12-10-65, Hawaii Administrative Rules, is repealed.

["**§12-10-65 Deposition.** For the purpose of obtaining any matter, not privileged, which is relevant to the subject matter involved in the pending action, the director may, upon application and for good cause, order the taking of relevant testimony by deposition upon oral examination or written interrogatories, or by other means of discovery in the manner and effect prescribed by the Hawaii Rules of Civil Procedure."] [Eff: 4/30/81; am 2/11/91, R
]

3. Section 12-10-66, Hawaii Administrative Rules, is repealed.

["**§12-10-66 Subpoenas.** (a) Subpoenas requiring the attendance of witnesses at a hearing before a hearings officer or for the taking of a deposition or the production of documentary evidence from any place within the State at any designated place of hearing may be issued by the director or a duly authorized representative. The employer shall serve a claimant with a copy of a medical record subpoena unless the employer has previously obtained the claimant's authorization to examine the claimant's medical records. Should the claimant subpoena medical records, the employer shall be served a copy.

(b) The party subpoenaing the records shall provide these records within fifteen calendar days of their receipt to the employer, claimant, the special compensation fund if a joinder has been filed, or their representatives. These records shall be submitted by the party requesting the subpoena to the director within seven calendar days of the date of the "Notice of Hearing" or upon request by the director.

(c) A party who desires to enforce the director's subpoena shall seek enforcement from a court of competent jurisdiction."] [Eff: 4/30/81; am 11/29/85; am 12/8/94, R
]

4. Section 12-10-69, Hawaii Administrative Rules, is amended to read as follows:

"§12-10-69 Attorney's fees. (a) Within ten calendar days following the filing of a final decision and order or upon the filing of a stipulation and settlement agreement, attorneys seeking approval of fees and costs claims pursuant to section 386-94, HRS, shall file with the department a request for approval of attorney's fees and costs setting forth a detailed breakdown of the time expended and costs incurred in each activity up to and including the date of the decision. The request shall be served on those parties against which the fees and costs claims are to be assessed. Any party objecting to approval of a request may file written objections no later than ten calendar days after service. No request for approval of attorney's fees and costs claims or agreement to pay attorney's fees and costs claims shall be valid until approved by the director. The director may require additional details and justification of time billed or costs claims. The director shall disapprove requests which are not served properly or filed timely, except for good cause.

[(b) In approving fee requests, the director may consider factors such as: the attorney's skill and experience in Hawaii workers' compensation matters; time and effort required by the complexity of the case; novelty and difficulty of issues; fees awarded in similar cases; benefits obtained for the claimant; hourly rate customarily awarded attorneys possessing similar skill and experience; and fees awarded in compensation cases usually come out of the employee's award.

(c)](b) Costs claims such as delivery, typing, telephone (except for long distance calls), fax, and parking are considered part of the cost of doing business and shall not normally be approved unless properly justified. Claims such as photocopying and long distance telephone calls may be approved as costs if properly justified." [Eff: 12/17/82; am 2/11/91;

am] (Auth: HRS §386-72) (Imp: HRS §386-94)

5. Section 12-10-94, Hawaii Administrative Rules, is repealed.

["§12-10-94 Self-insurance; application; duration; cancellation; revocation. (a) An employer desiring to maintain security for payment of compensation under section 386-121(a)(3), HRS, shall file an application with the director on a form provided for this purpose together with its most current audited annual financial statement.

(b) Where an applicant for self-insurance is a subsidiary and the subsidiary cannot submit an independent current audited annual financial statement, in lieu thereof an indemnity agreement approved as to form and content by the director shall be executed by the parent corporation of the subsidiary and submitted with its application.

(c) Each self-insurance authorization shall be effective from date of issue to June 30 of each calendar year.

(d) A notice of intention to cancel self-insurance shall be submitted in writing to the director within at least thirty days prior to the effective date of cancellation.

(e) A self-insurance authorization may be revoked by the director for good cause upon notification in writing to the self-insurer."] [Eff: 4/30/81, R]

6. Section 12-14-1, Hawaii Administrative Rules, is amended by amending the definitions of "Suitable gainful employment", "Vocational rehabilitation plan" or "plan", and "Vocational rehabilitation services" or "services" to read as follows:

"Suitable gainful employment" [means employment or self-employment within the geographical area where the employee resides, which is reasonably attainable

and which offers an opportunity to restore the employee's earning capacity as nearly as possible to that level which the employee was earning at the time of injury and to return the employee to the active labor force as quickly as possible in a cost effective manner, giving due consideration to the employee's qualifications, interests, incentives, future earning capacity, and the present and future labor market.] shall be as defined in section 386-1, HRS.

"Vocational rehabilitation plan" or "plan" [means an approved plan prepared by a certified rehabilitation provider with an employee that is designed to assist the employee to obtain and maintain suitable gainful employment.] shall be as defined in section 386-1, HRS.

"Vocational rehabilitation services" or "services" [means services provided in a rehabilitation program to assist an employee to obtain and maintain suitable gainful employment which may include, but shall not be limited to, vocational evaluation, adjustment to disability, counseling, guidance, vocational and personal adjustment, referrals, transportation, training, supplies, equipment, appliances, aid, occupational licenses, and other goods and services needed to assist an employee to obtain and maintain suitable gainful employment.] shall be as defined in section 386-1, HRS." [Eff. 1/1/81; am 1/28/85; am 4/12/93; am]
(Auth: HRS §386-72) (Imp: §386-25)

7. Section 12-14-4, Hawaii Administrative Rules, is repealed.

["§12-14-4 Initial evaluation required prior to submittal of vocational rehabilitation plan. A provider shall submit an initial evaluation report of the employee to the director and employer within forty-five days from the date of referral or selection. The evaluation shall determine whether the employee requires vocational rehabilitation services to return to suitable gainful employment, shall identify these services and shall state whether the

provider can provide these services. The initial evaluation report shall contain:

- (1) An assessment of the employee's:
 - (A) Current medical status;
 - (B) Primary disability;
 - (C) Secondary disabilities;
 - (D) Disabilities not related to the work injury; and
 - (E) Physical or psychological limitations or both. In the event this information is not provided by the treating physician in a reasonable amount of time, information from another physician will be accepted.
- (2) A job analysis addressing the demands of the employee's employment;
- (3) A statement from the provider identifying the employee's vocational handicaps in relation to the employee's ability to:
 - (A) Return to usual and customary employment; and
 - (B) Participate in and benefit from a vocational rehabilitation program.
- (4) A statement from the provider determining the feasibility of vocational rehabilitation services, including:
 - (A) The provider's ability to assist the employee in the employee's efforts to return to suitable gainful employment;
 - (B) An outline of specific vocational rehabilitation services to be provided, justification for the necessity of the services, estimated time frames for delivery of services, and how the effectiveness of these services is to be measured; and
 - (C) How the vocational rehabilitation services directly relate to the employee obtaining suitable gainful employment.
- (5) Enrollment form and Statement of Worker's Rights and Responsibilities form pursuant to

section 12-14-35."] [Eff. 1/1/81; am
1/28/85; am 4/12/93; am 11/08/99; R
]

8. Section 12-14-5, Hawaii Administrative Rules, is repealed.

["§12-14-5 Criteria for an approved vocational rehabilitation plan. (a) A provider shall file the employee's plan with the director for review and approval. The plan shall be subject to the approval of the employee. Upon receipt of the plan from the provider, an employee has ten days to review and sign the plan. The plan shall be submitted to the employer and employee and be filed with the director within two working days from the date of the employee's signature. A plan shall include a statement of the feasibility of the vocational goal, using the process of:

- (1) First determining if the employee's usual and customary employment represents suitable gainful employment; should it not,
- (2) Next determining if modified work or other work with the same employer represents suitable gainful employment; should it not,
- (3) Next determining if modified or other employment with a different employer represents suitable gainful employment; should it not, and finally,
- (4) Providing training to obtain employment in another occupational field.

(b) A plan may be approved by the director, provided it includes:

- (1) A physician's assessment of the employee's physical limitations, psychological limitations, and ability to return to work. In the event this information is not provided by the treating physician in a reasonable amount of time, information from another physician will be accepted;
- (2) A labor market survey indicating there is reasonable assurance that the proposed

occupation for which the employee is to be placed or trained is readily available in the community when placement begins, or there is assurance of reemployment by the employer;

- (3) A job analysis of the proposed occupation, setting forth its duties, responsibilities, physical demands, environmental working conditions, specific qualifications needed for entry level employment, reasonable accommodations, expected estimated earnings, and other relevant information;
- (4) The nature and extent of the vocational rehabilitation services to be provided, including:
 - (A) Specific services to be provided, justification for the necessity of the services, estimated time frames for delivery of services, and how the effectiveness of these services is to be measured;
 - (B) Criteria for determining successful completion of the vocational rehabilitation plan; and
 - (C) The employee's responsibilities;
- (5) Report of tests and copies thereof that have been administered to the employee, including a statement regarding the need for and use of the tests to identify a vocational goal;
- (6) If retraining, including on-the-job training, is found to be necessary, the estimated cost of retraining, a description of specific skills to be learned or knowledge acquired with specific time periods and clearly defined measurements of success, and the nature, amount, and duration of living expenses as provided in section 12-14-40;
- (7) Total cost of plan; and
- (8) The employee's approval of the plan.
- (c) The employer shall have ten calendar days

from the postmark date of the plan to submit in writing to the director any objections to the plan. The front page of the objection shall be clearly identified as a "VOCATIONAL REHABILITATION PLAN OBJECTION" in capital letters in no less than ten point type and may include a copy of the envelope showing postmark date.

(d) The director may approve a plan which does not include all of the requirements of subsections (a), (b) and (c) provided the director finds the plan:

- (1) Is in the best interest of the employee;
- (2) Contains reasonable assurance the employee will be placed in suitable gainful employment; and
- (3) Has been approved by the employee.

(e) In the event the plan requires the purchase of any tools, supplies or equipment, the deadline for purchase shall be included in the plan. Tools, supplies, and equipment are considered to be the property of the employer until the plan is determined by the director to be successfully completed, after which, it becomes the property of the employee. Included in the plan shall be a statement that should the deadline pass, the purchase shall be made and the employer shall pay for the purchase.

(f) An employee with an approved plan who is determined as able to return to usual and customary employment may choose to complete the plan or request the director take action under section 12-14-9(4) and allow a new plan whose goal must be the employee's usual and customary employment."] [Eff. 1/1/81; am 1/28/85; am 4/12/93; am 11/08/99; am 12/17/01; R]

9. Section 12-14-36, Hawaii Administrative Rules, is amended to read as follows:

"§12-14-36 Termination of right to vocational rehabilitation. (a) [An employee who has been issued a permanent partial disability award by the director or an] An employee who has stipulated away the right to vocational rehabilitation with the approval of the

director is determined to have waived the right to rehabilitation.

(b) The right to rehabilitation is preserved for any employee on temporary total disability and any employee who has been adjudged permanently and totally disabled by the director." [Eff. 1/1/81; am 4/12/93; am] (Auth: HRS §386-72) (Imp: HRS §386-25)

10. Section 12-14-48, Hawaii Administrative Rules, is repealed.

["§12-14-48 Reconsideration and hearing. (a) Except as otherwise provided, determinations of the rehabilitation unit are considered final unless a written request for reconsideration is filed with the rehabilitation unit within ten calendar days from the date of the determination. The front page of the request shall be clearly identified as a "REQUEST FOR RECONSIDERATION" in capital letters in no less than ten point type.

(b) The rehabilitation unit shall issue a reconsideration determination to affirm, reverse, or modify the determination or refer the request for reconsideration for hearing.

(c) A reconsideration determination is considered final unless a written request for hearing is filed within ten calendar days from the date of the reconsideration determination. A hearing shall be held before a hearings officer designated by the director. A written decision shall be issued in the name of the director." [Eff. 1/28/85; am 4/12/93; am 11/08/99; am 12/17/01; R]

11. Section 12-15-1, Hawaii Administrative Rules, is amended by amending the definitions of "Attending physician" and "Therapist", and by adding new definitions of "Emergency medical services" and "Guide" or "guidelines", to read as follows:

"Attending physician" [means a physician who is primarily responsible for the treatment of a work injury.

There shall be only one attending physician. In the event an injured employee is treated by more than one physician in accordance with section 12-15-40, the employee shall designate a physician as the attending physician.] shall be as defined in section 386-1, HRS.

"Emergency medical services" shall be as defined in section 386-1, HRS.

"Guide" or "guidelines" shall be as defined in section 386-1, HRS.

"Therapist" means a duly [registered] licensed physical therapist or [an] a duly registered occupational therapist certified by the National Board for Certification in Occupational Therapy, who renders therapy prescribed by a physician." [Eff 1/1/96, am 12/13/04, am] (Auth: HRS §§386-21, 386-26, 386-27, 386-72) (Imp: HRS §§386-1, 386-2, 386-21, 386-23, 386-27)

12. Section 12-15-36, Hawaii Administrative Rules, is amended to read as follows:

"§12-15-36 Assistants to providers of service.

(a) Providers of service may have treatment in their discipline carried out by persons certified or licensed to provide such service.

(b) Fees for services provided by licensed physician assistants as recognized pursuant to chapter 453, and registered nurses as recognized pursuant to chapter 457, shall be eighty-five per cent of the fees authorized by section 12-15-90.

(c) Physical therapists may have treatment in their discipline carried out by physical therapist assistants as recognized pursuant to 461J-3(e). Physical therapist assistants must have completed a program accredited by The Commission on Accreditation in Physical Therapy Education. The physical therapist assistants shall be compensated at sixty per cent of the fees authorized by section 12-15-90.

(d) Occupational therapists may have treatment in their discipline carried out by certified occupational therapy assistants as recognized pursuant to chapter 457G. Occupational therapy assistants must

have completed a program accredited by the Accreditation Council for Occupational Therapy Education or an accreditation body recognized by the Accreditation Council for Occupational Therapy Education. The certified occupational therapy assistants shall be compensated at sixty per cent of the fees authorized by section 12-15-90.

(e) The qualifications of assistants to providers of service must be identified on the bill for service for each service performed by an assistant. Fees that fail to identify services performed by assistants [shall] may be denied." [Eff 1/1/96; am 12/17/01; am 12/13/04, am]
(Auth: HRS §§386-21, 386-26, 386-72) (Imp: HRS §§386-21, 386-26)

13. Section 12-15-50, Hawaii Administrative Rules, is amended to read as follows.

"§12-15-50 Emergency treatment. (a) In emergency cases, an unqualified health care provider shall be duly compensated under the provisions of section 386-21, HRS, and any related rules, for services rendered to an injured employee.

(b) The unqualified health care provider shall, at the earliest reasonable and practicable time, transfer care of the injured employee to a duly qualified physician. Treatment provided by an unqualified health care provider subsequent to such time as deemed reasonable and practicable shall not be reimbursed.

[(c) Treatment which must be performed immediately or within fourteen calendar days because the condition is life-threatening or could cause serious harm is considered emergency treatment; however, the first treatment of the injury shall be allowed at a hospital based emergency room. This exception does not include "repeat" visits unless an emergency situation exists. The attending physician shall notify the director and the employer as soon as possible when emergency treatment is required.]" [Eff

1/1/96, am] (Auth: HRS §§386-26, 386-72) (Imp: HRS §§386-21, 386-26, 386-27)]

14. Section 12-15-52, Hawaii Administrative Rules, is amended to read as follows:

"§12-15-52 Anesthesia services. (a) A base unit is listed for all procedures in the medical fee schedule in accordance with section 12-15-90. This includes the base unit of all anesthesia services except the value of the actual time spent administering the anesthesia or in unusual detention with the patient.

(b) As allowed under Medicare, the anesthesia charges are equal to the sum of the base and time units for the service multiplied by a geographically adjusted anesthesia-specific conversion factor.

(c) The total value for anesthesia services includes pre- and post-operative visits, the administration of the anesthetic, and the administration of fluids or blood incident, or both, to the anesthesia or surgery.

(d) The time units are computed by dividing the total anesthesia time by fifteen minutes.

(e) Calculated values for anesthesia services shall be used when the anesthesia is administered by a licensed physician or certified registered nurse anesthetist and a fee shall be paid only for the individual anesthetic service.

(f) If the general or regional anesthetic is administered by the attending surgeon, the value shall be fifty per cent of the calculated value.

(g) Necessary drugs and materials provided by the anesthesiologist or certified registered nurse anesthetist may be charged for separately in accordance with section 12-15-55.

(h) When unusual detention with the patient is essential for the safety and welfare of the patient, the necessary time will be valued on the same basis as indicated for anesthesia time.

(i) No additional fee shall be allowed for local infiltration or digital block anesthesia administered by the operating surgeon.

(j) When either a hypothermia or a pump oxygenator, or both, are employed in conjunction with an anesthetic, the anesthetic "basic" value will be equal to that of procedure code 00560.

(k) Where anesthesia is administered for dental services, if the above rules are not applicable, a fee equal to that of procedure code 00120 for inhalation anesthesia and equal to that of procedure code 00102 by an intravenous route will be allowed." [Eff 1/1/96, am] (Auth: HRS §§386-21, 386-72) (Imp: HRS §386-21)

15. Section 12-15-55, Hawaii Administrative Rules, is amended to read as follows:

"§12-15-55 Drugs, supplies, and materials. (a) Charges for prescribed drugs, supplies, or materials for the use of the injured employee shall be separately listed and certified by the provider, or a duly authorized representative, that such charges for drugs, supplies, or materials were required and prescribed for the industrial injury.

(b) Dietary supplements such as minerals and vitamins shall not be reimbursable unless a specific compensable dietary deficiency has been clinically established in the injured employee as a result of the industrial injury.

(c) Payment for prescriptive drugs will be made at the average wholesale price [as] listed in the [American Druggist] Red Book plus forty per cent [of the average wholesale price] when sold by a physician, hospital, pharmacy, or provider of service other than a physician. Billings for prescriptive drugs must include the national drug code number listed in the current [American Druggist] Red Book followed by the average wholesale price listed at time of purchase by the provider of service. Approved generics shall be substituted for brand name pharmaceuticals unless the prescribing physician certifies no substitution is

permitted because the injured employee's condition will not tolerate a generic preparation.

(d) Payment for supplies, which includes shipping charges, shall not exceed cost plus forty percent [Shipping charges and taxes are reimbursable.] Providers are allowed to seek reimbursement for the applicable Hawaii general excise tax.

(e) Charges for orthotic, prosthetic, and durable medical equipment include fees for adjusting and fitting services and shall not exceed one hundred ten per cent of fees allowed by Medicare's fee schedule for durable medical equipment applicable to Hawaii. Beginning January 1, 2005 and each calendar year thereafter, the Medicare Fee Schedule in effect as of January 1 of that year shall be the effective fee schedule for that calendar year." [Eff 1/1/96; am 12/17/01; am 12/13/04; am] (Auth: HRS §§386-26, 386-72) (Imp: HRS §§386-21, 386-26)

16. Section 12-15-90, Hawaii Administrative Rules, is amended to read as follows:

"§12-15-90 Workers' compensation medical fee schedule. (a) Charges for medical services shall not exceed one hundred ten per cent of participating fees prescribed in the Medicare Resource Based Relative Value Scale System fee schedule (Medicare Fee Schedule) applicable to Hawaii or listed in exhibit A, located at the end of this chapter and made a part of this chapter, entitled "Workers' Compensation Supplemental Medical Fee Schedule", dated January 1, [2008] 2011. The Medicare Fee Schedule in effect on January 1, 1995 shall be applicable through June 30, 1996. Beginning July 1, 1996 and each calendar year thereafter, the Medicare Fee Schedule in effect as of January 1 of that year shall be the effective fee schedule for that calendar year.

(b) If maximum allowable fees for medical services are listed in both the Medicare Fee Schedule and the Workers' Compensation Supplemental Medical Fee Schedule, dated January 1, [2008] 2011, located at the

end of this chapter as exhibit A, charges shall not exceed the maximum allowable fees allowed under the Workers' Compensation Supplemental Medical Fee Schedule, dated January 1, [2008] 2011, located at the end of this chapter as exhibit A.

(c) If the charges are not listed in the Medicare Fee Schedule or in the Workers' Compensation Supplemental Medical Fee Schedule, dated January 1, [2008] 2011, located at the end of this chapter as exhibit A, the provider of service shall charge a fee not to exceed the lowest usual and customary fee received by the provider of service for the same service rendered to private patients. Upon request by the director or the employer, a provider of service shall submit a statement to the requesting party, [itemizing] indicating the lowest usual and customary fee received for the same health care, services, and supplies furnished to any private patient during the one-year period preceding the date of a particular charge. Requests shall be submitted in writing within twenty calendar days of receipt of a questionable charge. The provider of service shall reply in writing within thirty-one calendar days of receipt of the request. Failure to comply with the request of the employer or the director shall be reason for the employer or the director to deny payment.

(d) Fees listed in the Medicare Fee Schedule shall be subject to the current Medicare Fee Schedule bundling and global rules[.] if not specifically addressed in these rules. The Health Care Financing Administration Common Procedure Coding System (HCPCS) alphabet codes adopted by Medicare will not be allowed, except for injections and durable medical equipment, unless specifically adopted by the director. The director may defer to a fee listed in the Medicare HCPCS Fee Schedule when a fee is not listed in the Workers' Compensation Supplemental Medical Fee Schedule, Exhibit A.

(e) Providers of service will be allowed to add the applicable Hawaii general excise tax to their billing." [Eff 1/1/96; am 1/1/97; am 11/22/97; am 12/17/01; am 12/13/04; am 11/6/06; am 12/14/07;

am] (Auth: HRS §§386-21, 386-26, 386-
72) (Imp: HRS §§386-21, 386-26)

17. Material, except source notes, to be repealed is bracketed. New material is underscored.

18. Additions to update source notes to reflect these amendments are not underscored.

19. These amendments to Title 12, Chapter 10, Hawaii Administrative Rules, relating to Workers' Compensation, Title 12, Chapter 14, Hawaii Administrative Rules, relating to Vocational Rehabilitation, and Title 12, Chapter 15, Hawaii Administrative Rules, relating to the Hawaii Workers' Compensation Medical Fee Schedule shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules drafted in the Ramseyer format, pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on October 4, 2010 and filed with the Office of the Lieutenant Governor.

Director

APPROVED AS TO FORM:

Deputy Attorney General